United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1491 B

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1491

UNITED STATES OF AMERICA,

Appellee,

-v-

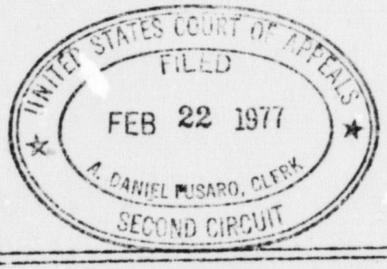
FRANK AMENDOLA,

Appellant.

On Appeal From a Judgment of The United States District Court for the District of Connecticut

---

APPELLANT'S BRIEF



ROGER J. FRECHETTE
Attorney for Appellant
Office and P.O. Address
215 Church Street
New Haven, Connecticut 06510
(203) 865-2133

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

AUTHORITIES CITED

CASES: Page

AUTHORITIES CITED (Continued)

AUTHORITIES CITED (Continued)

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1491

UNITED STATES OF AMERICA,

Appellee

vs.

FRANK AMENDOLA,

Appellant

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from an unreported judgment of conviction under a two count indictment charging defendant with conducting an illegal gambling business in violation of 18 U.S.C. Sec. 1955 and conspiracy to violate Sec. 1955 (Sec. 371). The case was tried before Honorable Robert C. Zampano and a jury. The first trial resulted in a mistrial on August 4, 1976, when the jury was unable to return a verdict. The defendant was not retried within sixty (60) days as required by 18 U.S.C. Sec. 3161(e) and District of Connecticut Rule 50(b). No time was attributed to him.

An appeal from the denial of a motion to dismiss on the grounds of double jeopardy has been previously filed in this Court (U. S. v. Amendola, Docket No. 76-1491). A motion to stay the trial pending appeal was denied on November 3, 1976, by this Court and the retrial, over objection, commenced on November 4, 1976, and on November 12, 1976, the jury found the defendant guilty on both counts.

Statement of Issues

1. Does the failure to commence a retrial within sixty (60) days after a mistrial caused by the jury's inability to return a verdict violate the clear directory requirement of Rule 50(b) district plan and 18 U.S.C. Sec. 3161(e), particularly when none of the delay is attributable to the defendant?

2. Whether defendant who was charged with violating 18 U.S.C. Sec. 1955 and 371 and trial ended in a mistrial because of a hung jury is entitled to the protection of the double jeopardy provision of the Fifth Amendment when the retrial has not commenced within the sixty-day mandate of 18 U.S.C. Sec. 3161(e) and Rule 50(b).

3. Did the Court err in overruling the objection to the testimony of Special Agent Holmes, which was developed after the sixty-day limitation of Rule 50(b) district plan and 18 U.S.C. Sec. 3161(e), and that this testimony stemmed from evidence illegally obtained as a result of a Pen

Register installed without judicial authority upon defendants' telephones and when the provision of 18 U.S.C. Sec. 2518 was not complied with?

4. Did the Court err in allowing Special Agent Connolly, who admitted that he had no more expertise in voice identification than the public at large, to testify that the voice on the tapes which were heard by the jury was that of the defendant Frank Amendola?

5. Do Falcone and Donovan permit a Pen Register to be installed under order permitting a wire tap, and if they do, does 18 U.S.C. Sec. 2518(8)(d) require a person so affected to be served with an inventory notice; does the failure of the government to advise the judge that a Pen Register and tap installed in October of 1973 indicating Amendola was a prime suspect require suppression of this evidence; and does the failure to indicate such information in the application of May, 1973, require suppression of the evidence so obtained, particularly when Amendola was not served with inventory notice of either installation, nor was the judge made aware of it so that he could exercise his judgment to order such notice?

6. Does the allegation that the defendant violated 53-298, which is a misdemeanor, allow the prosecution for violation of 18 U.S.C. Sec. 1955 after the one year statute of limitations has run?

7. Did the Court err on the missing witness charge

when it charged that the failure to produce five FBI agents was attributable to either the government or the defendant inasmuch as the defendant had the power to subpoena those FBI agents?

8. Did the Court err in not striking the testimony of O'Connor, the head security agent of the Southern New England Telephone Company, when he testified as to telephone records without a subpoena as required by 47 U.S.C. Sec. 605?

9. Was the playing of the defendant's voice exemplar which was made before the grand jury in the trial of the case, over objection, a statement of a testimonial nature such as to violate the defendant's Fifth Amendment rights against self-incrimination?

STATEMENT OF FACTS

The government claims by use of telephone taps and Pen Registers it uncovered gambling information which violated 18 U.S.C. Sec. 1955 and 371. Pursuant to an order to intercept telephone conversations the government installed a tap on the telephone of Valeriano, and it also installed a Pen Register on his line. Through the use of the Pen Register from January 17 - January 27, 1973, the government discovered Amendola's number 248-2088, and Agent Connolly, the agent in charge of the investigation, testified that but for the Pen Register they never would have gotten to Amendola. (App. 34,35)

No notice of inventory of the tap or of this Pen Register was ever served upon Amendola. No information concerning the Pen Register was ever made known to anyone until it was testified to during the first trial. The government would agree with this because it agreed with a letter from all counsel dated July 10, 1974, Page 2, Lines 22 and 23 which states that "no other electronic surveillance other than that described about" was present in the case. (App. 12)

In its application dated May 22, 1973, for a Pen Register to be installed on a telephone at Amendola's house there was no mention of a prior Pen Register being used anywhere in the investigation. This defendant, Amendola, was an unnamed person who was known to the government as early as January, 1973, but he was never served an inventory notice. Yet the government then applied for and obtained permission to install a Pen Register on this telephone on May 22, 1973, installed it, and never served him with an inventory notice as required by 18 U.S.C. Sec. 2518(8)(d), and never made this known to the judge.

The government then executed search warrants against various locations, including the home of the defendant, and obtained absolutely nothing remotely connected to the violations against which he was charged. (App. 36, 37) The sole evidence, then, against this defendant Amendola were tapes of telephone calls and the entire case against him was limited to the comparison of those electronic surveil-

lances and his voice exemplar, as no evidence was ever introduced against him which was not electronic in nature.

The testimony of the government in the case consisted of O'Connor, an employee of the telephone company, who testified without being subpoenaed, as to information permitting taps only; Agent Hendricks testified as to the installation of taps and Pen Registers; Agent Puckett testified that Amendola made a voice exemplar before the grand jury in March of 1974; Agent Connolly was used by the government to introduce the tape recordings of the defendants in the case, and was permitted, over objection, to identify the voice of this defendant despite having no more expertise than the public at large. (App. 37, 38) Officer Raucci also testified that he had no voice identification expertise which was different than the public at large. (App. 39) Further, his testimony was not developed until October 22, 1976, which date is after the critical date of October 4, 1976, when the sixty-day mandate of Rule 50(b) and Sec. 3161(e) had run. (App. 39, 40) The only other testimony in the case emanated from one William A. Holmes, an FBI agent who testified that based upon the voice identification of Agent Connolly and Captain Raucci he compared the designations on the tapes with exhibits which were seized at Valeriano's home and he further testified that these exhibits had the same designations as the tapes and therefore, Amendola was tied into the records

seized at Valeriano's. However, he testified that he did all of his work on this case "within the last week" (App. 40, 41) and "within the last week" is November 11, 1976, which is after the expiration of the sixty (60) day retrial mandate of Rule 50(b) and 18 U.S.C. Sec. 3161(e). (App. 40, 41) This Court should further understand that in the first trial, the government conceded none of the tapes of Amendola were connected to the Valeriano exhibits. Therefore, both the choice of tapes by Connolly, the testimony of Raucci and the testimony of Holmes was all prepared subsequent to October 4, 1976, and shows that the government took advantage of the delay to the detriment of Amendola.

ARGUMENT

I. DOES THE FAILURE TO COMMENCE A RETRIAL WITHIN SIXTY (60) DAYS AFTER A MISTRIAL CAUSED BY THE JURY'S INABILITY TO RETURN A VERDICT VIOLATE THE CLEAR DIRECTORY REQUIREMENT OF RULE 50(b) DISTRICT PLAN AND 18 U.S.C. SEC. 3161(e), PARTICULARLY WHEN NONE OF THE DELAY IS ATTRIBUTABLE TO THE DEFENDANT?

This case presents a good example of the kind of action taken by the government after Congress enacted the Speedy Trial Act, 18 U.S.C. §§3161-3174, after this Court decided U. S. v. Didier, ____F.2d.____ (2d. circ. 1976) Sl. Op. Docket Number 76-1331, October 13, 1976; U. S. v. Drummond, 511 F.2d. 1049 (Cert. denied, 423 U.S. 844 (1975)); U. S. v. Roemer, 514 F.2d. 1377 (2d. Cir. 1975), and most emphatically after the District of Connecticut promulgated its Plan for the Prompt Disposition of Criminal Cases which required retrial within 60 days, and which Plan was effective July 1, 1976; (Addendum) further, this Plan replaced Rule 50(b) which was effective October 6, 1975, and which Plan required retrial within sixty days. (Addendum)

After the jury declared itself deadlocked and unable to reach a verdict on August 4, 1976, the court declared a mistrial. Judge Zampano advised both counsel that a retrial must be had within 60 days. The defendant filed no motions, asked for no continuances and no time of delay can be attributed to Amendola.

The case appeared on the criminal jury assignment list

of September 14, 1976. At the call of the cases the first case (a group of companion cases) was marked to the effect that there would be a change of plea, but in any event, they would not provide any jury business.

The second case was marked ready, as was the third case; the Amendola case was called ready by both the government and the defendant (App. 15); the fifth case was dismissed, the sixth case was marked ready nisi for out-of-state counsel; the seventh case was marked ready, the eighth case was marked for change of plea, the ninth and tenth cases were both marked ready, the eleventh case was changed to a court trial, and the markings on the next four cases are unknown to the undersigned.

The Court then assigned the cases for trial by assigning the third case on said jury assignment list as the first ready jury case, the seventh case on the list as the second jury case, and the second case on the trial list as the third jury case. The Amendola case was indicated to be the fourth ready case, but the Court said it would only pick three juries on that day. The Court stated "That will be followed by U.S. versus Amendola, but I will not pick a jury this morning. I think it would be too much to pick four juries." (App.15) The attorney for Amendola then asked "May I have Your Honor's permission to represent to the

State [court - added by the undersigned] that you are holding me?" The court replied "I am not holding you." Counsel then inquired "If I could start, is that o.k.?" The Court responded "If you have business in State Court, go ahead and start disposing of it. We will give you some warning, because I am going to set Amendola down with Marenna and Apuzzo, and that won't be done for a couple of weeks. So I will be in touch with counsel and we will work it out." (App. 16)

The next jury trial assignment list mailed to counsel was for jury selection on October 19, 1976. On October 6, 1976, Amendola filed a motion to dismiss based upon the Speedy Trial Act, and more specifically Title 18, §3161(e).(Addendum) This motion was partially argued on October 19, 1976, (App. 18-27) and partially argued on October 20, 1976, (App. 32,33) when it was denied; upon denial of the motion, Amendola filed a motion to dismiss the indictment against him on the grounds of double jeopardy, which was denied. (App. 33)

The motion to dismiss was argued before the Court on October 19 and 20, 1976. (App. 19-27) The Didier case was cited as the authority that the sixty-day provision was mandatory. (App. 29-32) The Court denied the motion on the grounds that the prior 90-day rule applies, no sanctions are involved in the 60-day provision of the July 1, 1976, Plan and Didier does not require retrial within 60 days. (App. 31)

On the date of the mistrial there was in effect in the District of Connecticut a Rule 50(b) Plan which had been amended to conform to 18 U.S.C. Chapter 208. The prior 50(b) Plan effective October 6, 1975, was as follows:

> "7. Retrials.
>
> "Where a new trial has been ordered by the District Court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order. If the defendant is to be retried following an appeal or collateral attack, the court trying the case may extend such period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from the passage of time shall make trial within 60 days impractical."

That Rule, which had been amended, became effective July 1, 1976, and is as follows:

> "5(e) Retrial. The retrial of a defendant shall commence within 60 days from the date the order occasioning the retrial became final. If the retrial follows an appeal or collateral attack the court may extend the period if unavailability of witnesses or other factors resulting from passage of time made trial within 60 days impractical. The extended period shall not exceed 180 days (Section 3161(e))."

Section 3161(e) states:

> "If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial became final..."

The second sentence of this section refers to retrials after an appeal, and it does allow for extensions provided by

Section 3161(h).

It is apparent that the mandate of the local plan and the statutes are identical. They are both very clear. It cannot be said, as to this plan, that this provision of the plan was "so inartfully drawn" as was stated about the statute in United States v. Tirasso, 532 F.2d. 1298 (9th Cir. 1976). This is so because the judges of this district read the plan and then promulgated this rule. It is the same as the prior plan. The judges knew what is said, as they promulgated it twice. It ought to mean what it says.

There are no periods of delay which would extend time to commence trial except as set forth under subsection (h) of Section 3161, nor were there any requests by the government for a continuance which were made within the sixty-day period.

Section 3161(f) and (g) refer to the time limits wherein the Speedy Trial Act may be implemented; the Court's attention is drawn to the fact that there are no such provisions for Sec. 3161(e), therefore requiring strict construction for the benefit of Amendola as to the sixty-day rule. Inasmuch as the act is effective July 1, 1976, and there is no authority or need to implement a retrial after a mistrial at a time more than sixty days from the mistrial, it is mandatory that the effective date of subsection (e) can, and in no event, be later, in the District of Connecticut, than October 6, 1975, when the district plan 50(b) became effective.

Further, Section 3162 (sanctions) does not apply to Section 3161(e). Therefore, the sanctions in that section do not apply to save the dismissal for the government, and inasmuch as the United States District Court for the District of Connecticut has made its plan effective July 1, 1976, that is the latest date that Section 3161(e) can be said to be effective. It is equally apparent that revised Rule 50(b) Plan effective July 1, 1976, supersedes plan for achieving prompt disposition of criminal cases which was effective October 6, 1975, because of the statutory mandate, and because of the introductory paragraph in both plans.

It is apparent from Section 1(a) and (b) of the Plan that it specifically includes Amendola, and the case of U. S. v. Didier, supra, holds that Amendola would be covered by the Plan, as Didier was a pre-Sec. 3161(e) indictment.

Plan Sections 5(b)(2) and 6(b)(3) define the commencement of a trial as "A trial on a jury case shall be deemed to commence at the beginning of the voir dire."

A factual similarity between Amendola and Didier should be noted. Didier was indicted and went to retrial some three years after indictment; Amendola was indicted on May 3, 1974, and was exposed for retrial over 2-1/4 years later; Didier was retried 28 months after mistrial, while Amendola was exposed to retrial 3 months after mistrial; both cases are, as far as retrial is concerned, subsequent to U. S. v.

Drummond, 511 F.2d. 1049 and U. S. v. Roemer, 514 F.2d. 1377. Didier's retrial took place seven months after the 1975 Plan for the southern district was promulgated, whereas Amendola was exposed for retrial some 14 months after the Plan for Connecticut was promulgated.

Didier, at Page 74, states that 18 U.S.C. Sec. 3161(e) applies to indictments before July 1, 1975.

It seems that the second paragraph on Page 84 is dispositive of the sixty-day claim and that paragraph is quoted.

> "Further delay was also prohibited by the promulgation of the revised Southern District Plan for the Prompt Disposition of Criminal Cases, which became effective September 29, 1975. This Plan eliminated extensions 'for good cause' in retrials after mistrial and reduced the period for retrial to 60 days."

No request for a continuance or extension of the sixty-day provision was requested or granted, nor, in fact, could it be granted, unless the requested extensions would be consistent with the applicable Speedy Trial rules, and it is obvious that if an extension is not requested within the sixty-day period, it cannot be granted ab initio. Didier, Page 86, Note 11.

It is claimed that Note 8 on Page 85 of Didier is of no benefit to the government by reason of the fact that no requests for extension were made within the period, and further, the statute is mandatory that the retrial take place within sixty days, absent the conditions shown in subsection

(h), none of which are present in this case, and the record is devoid of any.

The Court's attention is drawn to the fact that the only difference in the two trials was that the government produced one Captain Vincent Raucci of the Hamden Police Department who did not testify at the first trial, but did testify in the second trial as to the identity of the voice of Amendola. The government also produced William L. Holmes, a special agent of the FBI, who did not testify at the first trial. Significantly, Agent Cross who testified at the first trial, but did not at the retrial, did not tie any of the telephone taps of Amendola to the exhibits seized at Valeriano's house. Holmes did - he took other tapes and tied them directly to the exhibits seized at Valeriano's house. This testimony was all prepared subsequent to October 4, 1976, and, therefore, was prepared outside the sixty-day time frame of the retrial limits. (App. 40, 41)

Amendola claims that it is not incumbent upon him to show that he was prejudiced by the inability of the Court to commence the case within the time as specified by the Act and Rules, nor is it incumbent upon him to show that the government bettered its case by reason of the delay. Nevertheless, that is precisely what happened in this case.

II. WHETHER DEFENDANT WHO WAS CHARGED WITH VIOLATING 18 U.S.C. SEC. 1955 and 371 AND TRIAL ENDED IN A MISTRIAL BECAUSE OF A HUNG JURY IS ENTITLED TO THE PROTECTION OF THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT WHEN THE RETRIAL HAS NOT COMMENCED WITHIN THE SIXTY-DAY MANDATE OF 18 U.S.C. SEC. 3161(e) AND RULE 50(b).

The double jeopardy prohibition of the Fifth Amendment of the United States Constitution is not against being twice punished, but rather against twice being put in jeopardy.

The denial of a motion to dismiss on the grounds of double jeopardy is a final judgment, and therefore, appealable; it is separate from, and collateral to, the main cause of action. This is so because the constitutional guarantee to preserve the right to be free from being twice tried for the same offense would be irreparably lost if one raised this bar, lost a motion, and had to wait until the final judgment on the retrial to raise the issue. U. S. v. Beckerman, 516 F.2d. 905; U. S. v. Lansdown, 460 F.2d. 164 (1972). A denial, therefore, of a motion to dismiss on the grounds of double jeopardy is a final judgment, and is therefore appealable.

The Court in Lansdown, at Page 171, Note 8, states that "Our decision does not apply to those cases in which the mistrial is declared at the request of the defendant, since in those cases the defendant has waived any claim of double jeopardy." Citing many cases. Therefore, it is apparent that the Court implicitly holds that any retrial is double jeopardy unless there is an excuse for the retrial. That excuse can be waived, as was the rationale of the Fourth

Circuit, or consent, which is the rationale in our circuit. In Lansdown, the Court held that a defendant is deemed to waive the right to be free from being placed twice in jeopardy, and in Beckerman the Court held that the defendant consented to being placed in jeopardy a second time.

It is the claim of Amendola that he in fact did waive any claim of double jeopardy by the mistrial, or in the alternative, he consented to be retried after a mistrial. Because of 18 U.S.C. Sec. 3161(e) he waived that right for a period of sixty days only, or in the alternative, he consented to be retried only if retried within sixty days; in either event, at the termination of the sixty days, without any extensions chargeable to him, he is free to, and in fact did, raise the constitutional defense against being placed in jeopardy a second time.

Both the government and the defendant are chargeable with knowledge of 18 U.S.C. Sec. 3161(e). That statute was in effect at the time of the mistrial on August 4, 1976, and the Connecticut Plan as hereinbefore stated, Rule 50(b), both on July 1, 1976 and October 6, 1975, was in effect at that time. Therefore, either his waiver or his consent are deemed to have taken place within the framework of the statutory law which was enacted for his benefit and the government's detriment, and he has an absolute right to take advantage of that statute, which he did by filing his motion to dismiss

on the grounds of speedy trial, and then, on that denial, filing his motion to dismiss on the grounds of double jeopardy. (App. 14-33)

"Waiver" is defined as the intentional or voluntary relinquishment of a known right. Black's Law Dictionary, 4th Ed., Page 1751. Lehigh Val. Company v. Ins. Co., 172 F.2d. 364. The law is clear that in order for one to "waive" a right he must do it knowingly and be possessed of the facts. Barnhill v. Reuben, D.D. Tex. 46 F. Supp. 963, 966. It is Amendola's contention that as far as waiver is concerned that he knowingly and intentionally must be deemed to have waived his right not to be retried, provided that waiver did not extend beyond the statutory period in which he had to be retried. He did not waive one moment beyond that time.

"Consent" as used in the Beckerman case at Page 908 is defined as an agreement that enough time had passed and that a mistrial should be declared. Amendola has no quarrel with that definition and rather adopts it. Amendola did consent to the mistrial, and therefore, he consented to be retried. But, when? The same argument that applies in the waiver provisions of this brief equally applies to the consent portion of the brief. Amendola consented to be tried within the framework of the statute promulgated by Congress and the rules promulgated by Courts, and which bind, not only Amendola, but the government and the Courts as well. Once

sixty-day period had passed, Amendola no longer consented to be retried. In fact, he declined to be retried and filed the appropriate motions. To now force him to be retried places him in the position of twice being put in jeopardy for the same offenses, in violation of his Fifth Amendment rights.

III. DID THE COURT ERR IN OVERRULING THE OBJECTION TO THE TESTIMONY OF SPECIAL AGENT HOLMES, WHICH WAS DEVELOPED AFTER THE SIXTY-DAY LIMITATION OF RULE 50(b) DISTRICT PLAN AND 18 U.S.C. SEC. 3161(e), AND THAT THIS TESTIMONY STEMMED FROM EVIDENCE ILLEGALLY OBTAINED AS A RESULT OF A PEN REGISTER INSTALLED WITHOUT JUDICIAL AUTHORITY UPON DEFENDANTS' TELEPHONES AND WHEN THE PROVISION OF 18 U.S.C. SEC. 2518 WAS NOT COMPLIED WITH?

The defendant objected to any testimony by Agent Holmes on the grounds that the only way in which the government was able to tie Amendola into this gambling operation was through the use of a Pen Register, both on Valeriano's phone and his own phone. He was not served with an inventory notice in either instance, that is on the occurrence of January 17 through January 27, 1973, and May 23 through May 27, 1973, and the government will admit this. This defect was raised originally on Page 11 of the Transcript (App. 41) when the first mention of the Amendola telephone was offered into evidence in which the specific grounds of objection set forth was a lack of an inventory served on Amendola and a brief was submitted in support of that position. Taking that claimed defect and further adding to it the admission by Special Agent

Holmes that he did nothing in this case until subsequent to October 4, 1976 (when the time for the retrial was mandated by Rule 50(b) and 18 U.S.C. Section 3161(e)) Amendola objected to the admission of any of his testimony. (App. 40) In that direct examination Agent Holmes admitted that he examined the exhibits in question "within the last week" (App. 40) and further, Holmes admitted that the first day he was in any way involved in the trial which is the subject of this appeal was on November 5, 1976. (App. 40, 41)

Amendola objected to Agent Holmes' testimony the very first time he attempted to testify to anything specifically connected with this case. (App. 40) The grounds of the objection as set forth were that (a) the government was only able to get to Amendola because of the use of a Pen Register which was invalid because no inventory notice was served upon him in violation of statute; and (b) the testimony of this agent was prepared subsequent to the sixty-day mandate of the retrial requirements of Rule 50(b) and 18 U.S.C. Sec. 3161(e), and in fact, this particular testimony was developed some ninety days subsequent to the order of mistrial.

It is apparent that in the trial of the case the first time, Agent Cross was unable to indicate any connection between the telephone conversations of Amendola to the exhibits which were found in Valeriano's house; the government then produced, at the second trial, an agent who testified that, subsequent to October 4, 1976, the critical date, he

was able to develope a connection between specific conversations of Amendola and with the exhibits seized at Valeriano's house. It is obvious that this testimony tied Amendola into the exhibits seized at Valeriano's home in a very direct way, which was not the case at the first trial, and the government has had the advantage of the violation of Rule 50(b) and 18 U.S.C. Sec. 3161(e), which advantage inured to the detriment of Amendola.

By the same token, Captain Raucci did not testify at the first trial, and he did at the second trial, but he admitted that his testimony was developed subsequent to the critical date of October 4, 1976, and it suffers from the same disabilities as Agent Holmes.

Amendola concedes that he is unable to find any case which specifies that the testimony of Holmes and Raucci was not admissible solely because of Rule 50(b) and/or 18 U.S.C. Sec. 3161(e), but the inescapable holding of Didier is that such evidence should not be received into evidence.

IV. DID THE COURT ERR IN ALLOWING SPECIAL AGENT CONNOLLY, WHO ADMITTED THAT HE HAD NO MORE EXPERTISE IN VOICE IDENTIFICATION THAN THE PUBLIC AT LARGE, TO TESTIFY THAT THE VOICE ON THE TAPES WHICH WERE HEARD BY THE JURY WAS THAT OF THE DEFENDANT FRANK AMENDOLA?

It is important to understand that in the course of the trial, the government's case consisted of the security officer of the telephone company who provided information to the FBI as to where the wiretaps could be made; the next witness was the

FBI agent who physically installed the tap, and the Pen Register; the next witness was an FBI agent who, pursuant to an order of court made Amendola's voice exemplar for the grand jury, and, over objection, he was allowed to play Amendola's voice and identify it as Amendola's voice to the jury. (App. 46-48) After this was done, Agent Raymond A. Connolly was allowed by the court, over objection, (see brief offered in conjunction with objection) (App. 49-51) to offer his opinion that the tapes had the voice of Frank Amendola and that he arrived at this decision by comparing the tapes with the voice exemplar hereinabove referred to. He admitted at Page 224 of the Transcript, and the government must admit, "that you have no more expertise in the identification of voices than the general public at large. Isn't that so?" His answer was "That is correct." He further admits this non-expertise of voice identification as follows:

> "Question: So what you are telling us is that you, just as anyone, general public at large, or me, for example, have passed an opinion based upon listening to one set of tapes and comparing them to another set of tapes. Is that so?
>
> Answer: That is correct."

The defendant moved that the voice identification of both Connolly, and later Raucci, be suppressed by reason of the fact that once a jury listens to the tapes and compares that to a voice exemplar which is in evidence, then and in that

event, a lay witness is not permitted to testify that those two tapes are one and the same. Such is not the case if it were an expert who claimed, and had the proper foundations, to be able to claim to be an expert in the identification of voices by comparison of tapes. That is not the instance here, as Agent Connolly readily admitted, as he did in the first trial, that he is not an expert in the comparison and identification of voices by comparing tapes.

Let us examine a common offer of evidence in a bank robbery case, for example, in order to drive home that point. Suppose, for example, the government offered the movies of a hidden camera in a bank which photographedthe bank robber. In the trial that movie is shown to the jury for the purpose of having the jury identify the person in the movie as being the defendant who is at bar. No one would seriously pursue the proposition that a lay witness be permitted to testify, and this of course, presumes no expertise, one with the expertise of the one with the qualifications of the public at large, that the picture of the defendant is the same as the movies taken in the bank from the bank's hidden camera. Why? That is because that is the sole province of the jury, unless the identification is made by someone having special training or experience in the field. To allow a lay witness to give his opinion that a voice exemplar on the one hand and tapes on the other hand are one and the same takes that

critical issue from the jury and allows a non-expert to testify to that conclusion, which either (a) takes no expertise, or (b) if it takes expertise, must be answered by an expert. Either way, the government has failed, and the Court erred in allowing the identifications by Connolly and Raucci.

Naturally, the impact of a conclusion by an FBI agent has very serious consequences to the jury and is highly prejudicial to the defendant.

In addition, Amendola filed a brief with his motion to exclude lay identification in comparison of voices on tape. (App. 49-51) It is respectfully submitted that U.S. v. Chiarizio, 388 F. Supp. 858 (D. Conn.) aff'd. 525 F.2d. 289 (2d. Cir. 1975) appears to stand for the proposition that an agent can listen to one tape, compare with another tape, and offer an opinion as to the identity of both voices.

Chiarizio cites Davis v. U. S., 279 F.2d. 576, 579 where the undercover agent had never previously talked to Davis, but in the conversation in question he talked to Davis who made a telephonic announcement of himself, and that person who made a telephonic announcement of himself requested a co-conspirator, Johnson, to deliver a package to a man whom he would meet at a designated time and place and collect a certain sum of money. Both Johnson and the agent testified that the delivery and collection were accomplished and the agent testified that it was in accordance with the plans he

had made with Davis during that particular telephone conversation. Further substantiation occurred when the agent spoke to Davis a second time, when another agent testified that he positively identified Davis as the speaker. Therefore, what occurred in the Davis case is not an agent comparing a tape with a tape, but an agent identifying his own voice and that of Davis with a multitude of corroborating evidence. All of that is missing in this case. Another reference in Chiarizio is Palos v. U. S., 416 F.2d. 438, in which the Fifth Circuit has held that circumstantial evidence can be used to establish the identity of the person who was called, and most significantly, the person who identified the voice was the same agent who monitored the telephone call. When the undercover agent dialed a number registered to Palos, (not Palos' wife) and the phone was answered, the undercover man requested "Palitos" which was a name by which Palos was known, and as a matter of fact, is the Spanish term for little Palos, and he, the defendant, responded, "yes, this is he." Once again, this is not the instance of an agent without expertise comparing records, and you do have, and is present the corroborating circumstances.

U. S. v. Rizzo, 492 F.2d. 443, 448 is of no authority for the holding in Chiarizio by reason of the fact the opinion is silent as to when or how the agents made the identification, whether they heard the voice in the court,

listening to an exemplar, or identified other tapes. This case merely refers to U. S. v. Bonnano, 487 F.2d. 654, 566, 569. In Bonnano, at 659, and of great significance, is that no objection was made as to the admissibility of the evidence, and therefore, it was not properly raised. In the case at bar it was raised, it was substantiated with a brief.

The Court should not have allowed the opinion of Connolly, a lay witness, as it is not satisfied by case law or logic, and its impact on a jury is overwhelming.

V. DO FALCONE AND DONOVAN PERMIT A PEN REGISTER TO BE INSTALLED UNDER ORDER PERMITTING A WIRE TAP, AND IF THEY DO, DOES 18 U.S.C. SEC. 2518(8)(d) REQUIRE A PERSON SO AFFECTED TO BE SERVED WITH AN INVENTORY NOTICE; DOES THE FAILURE OF THE GOVERNMENT TO ADVISE THE JUDGE THAT A PEN REGISTER AND TAP INSTALLED IN OCTOBER OF 1973 INDICATING AMENDOLA WAS A PRIME SUSPECT REQUIRE SUPPRESSION OF THIS EVIDENCE; AND DOES THE FAILURE TO INDICATE SUCH INFORMATION IN THE APPLICATION OF MAY, 1973, REQUIRE SUPPRESSION OF THE EVIDENCE SO OBTAINED, PARTICULARLY WHEN AMENDOLA WAS NOT SERVED WITH INVENTORY NOTICE OF EITHER INSTALLATION, NOR WAS THE JUDGE MADE AWARE OF IT SO THAT HE COULD EXERCISE HIS JUDGMENT TO ORDER SUCH NOTICE?

The defendant Amendola, at the commencement of the case, moved to suppress any and all evidence against Amendola which was garnered as a result of, and led from the installation of two Pen Registers, one at the home of Valeriano, which Pen Register was installed between January 17, 1973 and January 27, 1973, and the other one as a result of a Pen Register which was installed on a telephone in his house between May 23 and May 27 of 1973. (App. 41, 42) A copy of Amendola's motion to suppress evidence is printed in the

Appendix at Page 42.

It was the claim of Amendola at the trial that although the government installed a valid telephone interception on the telephone of Daniel Valeriano, that interception order did not permit the installation of a Pen Register. The position of the government, which was adopted by the Court, was that a Pen Register was a lesser included intrusion than a tap, and therefore, no separate application and order was needed for that Pen Register installation of January of 1973. Amendola claimed that, inasmuch as both the government and the Court admitted a judicial order was necessary to permit a Pen Register to be installed on a telephone, (because it is First and Fourth Amendment rights which were being infringed upon) an inventory notice had to be served upon the defendant. It is conceded that, as to the January, 1973 application, Amendola was not a named person. It is further without question that he was not served with an inventory notice after the termination of the tap and Pen Register doings on Valeriano's phone. It is further without question, and Amendola would expect the government to so concede, that nowhere between the authorization for a tap of January of 1973 and the date of trial did the government make known to any judge that Amendola was a target defendant as a result of the tap of January of 1973. It is further without question that subsequent to the order of May 22, 1973, which permitted a

Pen Register to be installed upon the telephone of Amendola, that he was not served with an inventory notice of that proceeding. It is further without question that as to the May, 1973, Pen Register installation he was a named person, who should have received, but he was never served with any inventory notice whatsoever. Because of the impossible task of proving a negative, the defendant will leave it to the government to point out to this Honorable Court any document indicating an inventory notice was served upon Amendola.

It is Amendola's claim that U. S. v. Chun, 386 F. Supp. 91 requires the government to submit to the judge the data on a person, other than a named person, about whom incriminating evidence is obtained so that the judge may exercise his discretion as to whether that person whould receive an inventory notice pursuant to 18 U.S.C. Sec. 2518(8)(d).

In the case of U. S. v. Donovan, No. 75-212, U.S. Sup. Ct. January 18, 1977 (45 U.S. Law Week 4115) we have a factual situation which is quite analogous to the instant case, compounded by the fact that by the problem that neither one of the Pen Register intrusions resulted in an inventory notice being served on Amendola, and there is absolutely no evidence as to any reason why the government did not serve such an inventory notice as is required by 18 U.S.C. Sec. 2518(8)(d), nor did it explain its failure to inform the issuing judge of the identity of others whose conversations

were overheard.

It is the contention of Amendola that evidence derived from wire taps and Pen Register intrusions in this case must be suppressed under 18 U.S.C. Sec. 2518(10)(i) if "the communication was unlawfully intercepted."

It is respectfully submitted that as to the tap of January, 1973, Amendola is analogous to Merlo and Lawlor in the Donovan case because he, as they, were not known persons whose conversations were to be intercepted. Similarly, after that tap of January, 1973, 18 U.S.C. Sec. 2518(8)(d) the government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with inventory notice of the interception. Amendola's name was not given to the judge, as the government was required to do. The government did not comply with 18 U.S.C. Sec. 2518(8)(d) since Amendola's name was not included on the list of identifiable persons submitting to the judge. As a result of that failure to comply with that portion of 18 U.S.C. Sec. 2518(8)(d) it is obvious that the government did not allow the judge to have the option to consider whether or not he would order notice to a party other than a named person to be served with the inventory and notice of entry of the order or application. This was never done. Of great significance

is the fact that the government nowhere in this record can point to any reason why it was not done. In other words, it is not the analogous situation, which the Supreme Court found a reasonable excuse for not notifying the judge and serving the defendant with notice, of 39 out of 41 individuals having compliance with the statute by the government. Here most of the defendants did not get notice, nor were they served with the inventory.

With regard to the May, 1973, Pen Register and order, we find that Amendola is in the same situation as is Donovan, Robbins, and Buzzaco in Donovan, in that he was a named person in that application. However, there was no inventory notice, nor was the judge ever made aware of what transpired as a result of that Pen Register.

It is apparent, then, that there were two violations of U.S.C. 18, Section 2518(8)(d) by the government. In both of these violations, that is, in January and May of 1973, no information was given to the judge which would allow him to decide whether or not Amendola was a person to whom inventory notice should be given. It is patently obvious that as to the May, 1973, application and order he certainly should have notice, and it seems inescapable because of Chun, supra, and Donovan, that he was entitled, and the judge would have given him notice had it been drawn to his attention.

It is submitted that 18 U.S.C. Sec. 2518(10)(a)(i) mandates suppression because the information was simply with-

held from the issuing judge so that he was unaware as to whom inventory notice should be sent. This is so because there is not a scintilla of evidence that the government "inadvertently" omitted Amendola's name from the very short list of all identifiable persons whose conversations had been overheard. The government offered no evidence or theory whatsoever that the failure to serve an inventory notice on Amendola in either case was inadvertent or through mistake. It just admits no such inventory was served. In short, the violation of 18 U.S.C. Sec. 2518(8)(d) from this case is as patent as the violation of Rule 50(b) and 18 U.S.C. Sec. 3161(e), and as with those two mandates having been broken, the government's position succinctly is that the government just does not have to follow the mandates of the statute. In neither case has there been any evidence whatsoever of a failure to serve inventory notice which would in any way bring the failure to serve inventory notice within Donovan. Therefore, it is apparent that the three-pronged test of Donovan to warrant this evidence from not being suppressed. Obviously, and particularly, as a result of the wiretap, the government knew in January of 1973 that Amendola was a "principal target" and as such, he should have been served a notice of inventory, and certainly as to the May, 1973, Pen Register application and order he was a "principal target" because he was the only target.

Secondly, the government has a statutory responsibility

to inform the issuing judge of the identity of the persons whose conversations were overheard in the course of the intercention, and the failure to do this deprives the judge of the opportunity of deciding whether Amendola, in this case, should be served with notice of intercention pursuant to 18 U.S.C. Sec. 2518(8)(d).

Thirdly, it is apparent that the failure to comply with the statutory provisions requires suppression of evidence under 18 U.S.C. Sec. 2518(8)(d) because there is no excuse put forth whatsoever as to why Amendola was not served with inventory notice. To excuse the government in this case, unlike Donovan, is merely to state that the government need not concern itself with the niceties of 18 U.S.C. Sec. 2518 and allow them to do anything that they want.

As has been earlier referred to on Pages 4 and 5 of this brief, and appendix pages 11 and 42 the first indication that the defendants received concerning the use of a Pen Register on the January, 1973, wiretap occurred in Court at the first trial. The defendants both objected to any evidence coming into Court as a result of the Pen Register on the grounds that there was no order for a Pen Register, or in the alternative, if this Court decided to follow the rationale of U. S. v. Falcone, 505 F.2d. 478 (3rd Cir.) Cert. denied 420 U. S. 955 (1975) then and in that event it would be a lesser included part of the whole (Pen Register v. wiretap), but in any event, an inventory notice would have to be served.

The proof that Amendola should have been served with an inventory notice as a principal target having regard to the January, 1973, tap is that as a result of that tap he became the principal target of the May, 1973, tap.

In support of the proposition that an inventory notice must be served is Application of the United States in matter of order, etc., 538 F.2d. 966 (2nd Cir. 1976) in which this Court has held that a Pen Register order must be based upon probable cause. If that be the case, that is, where a Pen Register alone requires an order based upon probable cause, then certainly the inventory notice must be served. Again, this was raised at the earliest possible time, particularly in view of the fact that the government represented there was no such Pen Register. (App. 41, 42)

The government would concede that but for the Pen Register installed on Valerino's phone, on the January, 1973, telephone tap, the government never would have been lead to Amendola. (App. 34, 35, 37)

VI. DOES THE ALLEGATION THAT THE DEFENDANT VIOLATED 53-298, WHICH IS A MISDEMEANOR, ALLOW THE PROSECUTION FOR VIOLATION OF 18 U.S.C. SEC. 1955 AFTER THE ONE YEAR STATUTE OF LIMITATIONS HAS RUN?

Amendola moved, under Rule 29(a) to dismiss the information against him because the violation alleged in the information 53a-298, policy playing, is a misdemeanor, and the overt acts charged against Amendola took place between January 17 and January 27, 1973, and he was not arraigned

until May 4, 1974.

The Court's attention is directed to U. S. v. Sacco, 491 F.2d. 955 Court of Appeals Calif. 1974, in which the holding of the case is that 18 U.S.C. Sec. 1955 applies only where gambling is illegal, Sacco, supra, 1003. The law seems clear that federal rules of evidence apply to a trial for a violation of the substantive state law; the question that is unanswered in Sacco is the problem that arises when the federal prosecution takes place subsequent to the running of the state statute of limitations. Let us examine the rationale of Sacco at 1003, where the Court held:

> "Henderson claims that California Rules of Evidence are applicable on a federal prosecution under 1955. This is incorrect. While Congress did adopt a particular substantive statute (anti-gambling) of the state, Congress did not incorporate into §1955 the procedural rules of the State where the alleged activity occurred."

This case seems to stand for the proposition that on procedural rules, the federal jurisdiction takes precedence. The question remaining then, is the statute of limitations, a substantive or a procedural rule.

U. S. v. Chiarizio, 388 F. Supp. 862 really does not address itself to this problem because it rubber stamps a holding in U. S. v. Revel, 493 F.2d. 1, in which the court held: "It seems reasonable to use Federal Statutes in enforcing federal law." There is absolutely no rationale in the Revel case, and the key to the situation, it is respect-

fully submitted, is whether or not the statute of limitations is a procedural or a substantive rule.

Defenses are generally regarded as substantive in nature. 16 Am. Jur. 2d. conflicts §122.

It should be remembered that in the criminal field the statute of limitations is a surrender by the sovereign of its right to prosecute. It bars prosecution, and is not merely a statute of repose as it is in a civil case. In short, it is not a procedural provision. People v. Poss, 325 Ill. 417, 156 N.E. 303; People v. Hines, 284 N.Y. 93, 29 N.E. 2d. 483.

An analogy to the problem is that when Congress does not make provision for the time in which an action may be brought, the applicable statute of limitations is that provided in the state wherein the action arose. Smith v. Cremins, C.A. 9 Cal. 308 F.2d. 187; State v. Fogel, 16 Ariz. App. 246, 492 P.2d. 742.

It is rather obvious then, that because the misdemeanor statute of limitations had run before the indictment, then and in that event there was no crime against the sovereign of the State of Connecticut, and hence, no crime against the United States, and this would be the same analogy as to U. S. v. Gordon, 464 F.2d. 357 (1972) wherein if there is not a violation of state statute the Court held that because it was not illegal to gamble in Nevada, there cannot be a violation of §1955.

The defendant moved for a judgment of acquittal under

29(a) as follows:

> "I want to make my claim once again that a state violation is a misdemeanor, that one year has passed, and I draw your Honor's attention to Sacco and Gordon, which I did before, which I say prohibits a federal prosecution because there is no state violation.
>
> THE COURT: Your claim is overruled."

VII. DID THE COURT ERR ON THE MISSING WITNESS CHARGE WHEN IT CHARGED THAT THE FAILURE TO PRODUCE FIVE FBI AGENTS WAS ATTRIBUTABLE TO EITHER THE GOVERNMENT OR THE DEFENDANT INASMUCH AS THE DEFENDANT HAD THE POWER TO SUBPOENA THOSE FBI AGENTS?

In this trial, as in the first trial, the defendant requested the Court to charge (Request to Charge #5) the jury that inasmuch as FBI Agents Santacruz, Ludwig, Michaels, and Slifka had monitored telephone calls allegedly of Amendola, inasmuch as they were still employed by the FBI and inasmuch as they were physically located in Connecticut, that these men were employees of the government, the jury might expect the government to call them concerning voice identification; the government did not call them, and that the jury was then free to draw the inference, if it chose, that had these FBI agents so testified, the testimony would have been adverse to the government's case. (App. 52, 53)

Instead of this missing witness charge, the Court charged as follows:

> "...A defendant is not required to establish his innocence. He need not produce any evidence whatsoever if he does not choose to do so.

As I indicated to you, the burden is on the Government to prove a defendant guilty beyond a reasonable doubt. If it fails, a defendant has a right to rely on that failure and of right must be acquitted.

In the course of the summations in this case some attention was drawn to the failure to call a certain witness or witnesses. It was claimed that, had they been called as witnesses, they might by their testimony have thrown some light on the situation before you.

It is true that, where a party fails to call to the stand a witness who, if so called could testify as to a material fact, and where it is within the sole or peculiar power of that party to call him, you are entitled to infer that, had he testified, that testimony would be unfavorable to the party failing to call him, and to consider that fact in arriving at your decision.

You must, however, first reasonably conclude that the person not called could give material testimony and that it was within the sole or peculiar power of the party failing to call him to put him on the witness stand.

In this regard, I instruct you that in a federal criminal trial both the Government and the defendant may issue subpoenas calling for the attendance of witnesses, including agents of the FBI, no matter where the witness lives or for whom the witness or witnesses are employed.

If these persons could have been called by either side as witnesses, the failure to do so by either side permits the jury to infer that their testimony might have been unfavorable to either the Government or the defendant. But it is equally within your discretion to draw no inference at all from the failure of the Government or the defendant to call these witnesses.

What I have just stated concerning the failure of a party to call a witness or witnesses does not, of course, apply to the defendant who did not take the stand to testify. As I instructed you, the defendant had a constitutional right not to be a witness."

The Court, at Page 517, indicated that it would not charge as requested, but rather would charge as laid down in U. S. v. Ploof, 416 F.2d. 107 (2nd Cir. 1969) and U. S. v. Crisona, 464 F.2d. 116 (2nd Cir. 1972).

It is respectfully submitted that these charges by Judge Murphy do not apply to the situation at bar because the missing witness charge requested in this case is specifically against agents of the FBI who, at the time of trial, were still agents of the FBI and operating in the State of Connecticut. It appears that U. S. v. ex. rel. Cannon v. Smith, 527 F.2d. 702 (2nd Cir. 1975) allows the missing witness charge to be phrased to the benefit of a criminal defendant and against the government. It is submitted that by comparing Smith against Crisona and Ploof the difference in the cases is that in Smith there are government employees against whom the inference may be drawn as opposed to Crisona and Ploof, in which there are just missing witnesses in which Judge Murphy treated both parties the same.

This is highlighted by the first two sentences quoted in the Court's charge. They state:

> "A defendant is not required to establish his innocence. He need not produce any evidence whatsoever if he does not choose to do so."

Further, the Court correctly charged:

> "...The burden is on the government to prove a defendant guilty beyond a reasonable doubt. If it fails, a defendant has a right to rely upon that failure and of right must be acquitted."

To then charge:

> "...in a federal criminal trial both the government and the defendant may issue subpoenas calling for the attendance of witnesses, including agents of the FBI, no matter where... If these persons could have been called by either side as witnesses, the failure to do so by either side permits a jury to infer that their testimony might have been unfavorable for either the government or the defendant."

is just inconsistent with the law. The Court cannot say on one hand the government has the burden of proof beyond a reasonable doubt and the defendant may do nothing and rely upon the failure of the government, in which case the defendant must be acquitted, and then in the next breath say that because the defendant has the power of subpoena, his failure to produce FBI agents may permit the jury to infer that their testimony might have been unfavorable to the defendant is completely inconsistent, and it is respectfully submitted, error.

This is a particularly damaging charge when the defendant not only did not take the stand himself, but offered no evidence whatsoever.

It is respectfully submitted that by giving the charge as it did, the Court allowed the jury to draw an unfavorable inference which infringed upon the defendant's right to rest upon the government's burden of proof, and the government's failure of proof. And it is inconceivable that the jury should be charged that they can draw an unfavorable inference

from the defendant's failure to call four FBI agents who monitored taps.

VIII. DID THE COURT ERR IN NOT STRIKING THE TESTIMONY OF O'CONNOR, THE HEAD SECURITY AGENT OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, WHEN HE TESTIFIED AS TO TELEPHONE RECORDS WITHOUT A SUBPOENA AS REQUIRED BY 47 U.S.C. SEC. 605?

Defendant objected, during the testimony of John O'Connor, chief of security, to the admission of any testimony whatsoever concerning a Pen Register (App. 41), filed a brief in support of his objection (App. 41), and that proposition was fully understood by the Court and rejected, (App. 46) wherein the Court stated:

> "...I am very well aware that the--, your brief is designed to affect almost every single thing against your client, because it deals with the basic underlying lead to your client, the Pen Register."

The brief referred to 47 U.S.C. 605, Appendix page 43, lines 21 and 22. O'Connor admitted he came to Court without a subpoena, in short, he violated 47 U.S.C. Sec. 605 when he admitted the following, as shown by Transcript Page 33:

> "Q. Have you been subpoenaed yet? Are you under subpoena is my question to you?
>
> A. He told me to appear, yes. Uh huh.
>
> Q. Was a subpoena served on you Mr. O'Connor?
>
> A. No sir.
>
> Q. Do you usually come over and give this information without a subpoena?
>
> A. No, sir."

At the close of the case the defendant moved to strike exhibits 5, 6, and 7 and all of the testimony of O'Connor

on the grounds that he testified without a subpoena in violation of statute. That motion was denied. (App. 52)

The statute is clear. It was violated, and the government simply cannot do this - it cannot violate the law.

IX. WAS THE PLAYING OF THE DEFENDANT'S VOICE EXEMPLAR WHICH WAS MADE BEFORE THE GRAND JURY IN THE TRIAL OF THE CASE, OVER OBJECTION, A STATEMENT OF A TESTIMONIAL NATURE SUCH AS TO VIOLATE THE DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION?

The order of events leading up to the introduction of the voice exemplar, as opposed to the tapes on the Valeriano phone, is essential to understand the claim of Amendola. The government's first witness, O'Connor, the chief of security from the Southern New England Telephone Company testified as to information given to allow the installation of both the Pen Register and the taps; the second government witness, Special Agent Hendricks, testified as to installing the taps and the Pen Register. The third witness, Special Agent Puckett, testified that he took the voice exemplar of Frank Amendola before the grand jury (App. 46, 47) which testimony was objected to by the defendant. The government, before any tapes were played or voices identified, offered to play the voice exemplar of Frank Amendola and Amendola stated "would your Honor entertain a further motion based upon the Fifth Amendment please the court?

THE COURT: Yes.

MR. FRECHETTE: Thank you very much.

THE COURT: Yes, and overruled." (App. 48)

The next witness was Special Agent Connolly who, in essence, testified that he was the case agent, he was the one who accumulated the tapes, he decided which ones would be played before the jury, and he made the comparison of those tapes with the voice exemplar. (App. 53, 54)

The point that distinguishes this case from U. S. v. Wade, 388 U.S. 218, and Schmerber v. California, 384 U.S. 757 and their progeny is that the identification of Amendola was done solely as the result of a subpoena served upon him to give a voice exemplar to be used by the grand jury. That voice exemplar was then played to the jury in this case before it heard a tape and it should be noted Amendola not only did not take the stand, but offered no evidence whatsoever.

This is not an offer of evidence to corroborate testimony in which the physical aspects or characteristics of a voice were offered to allow a witness to collaborate testimony. The sole reason for the offer of this testimony to this jury was to convict the defendant out of his own mouth that he committed the crime in question. The Court must remember that nothing was found as a result of a search at Amendola's house and person, nor was information garnered as a result of any surveillance of his house. (App. 54-56)

Therefore, with the disability of the Pen Register as hereinbefore stated, the disability of allowing Agent Connolly to testify as to his opinion as to whom the voice belonged, then the only evidence against Amendola is that voice exemplar

which was played in the Court twice, and which convicted him out of his own mouth, as without it being played in the first trial there was a hung jury and with it being played in the second trial he was convicted. If this is not the self-incrimination which applies to evidence of communications or testimony of the accused, it is hard to imagine what is. The only evidence against Amendola is the voice. The crux of the government's case is the voice of Amendola - to play his voice exemplar is testimonial because of the uniqueness of this case.

U. S. v. Schwartz, 457 F.2d. 895 holds that it is not a Fifth Amendment violation for a person to have a voice exemplar played to the jury. This defendant requests this Court to re-examine this holding in view of the unique circumstances of this case, and the Court is requested to adopt Justice Fortas' dissenting opinion in Gilbert v. California, 388 U.S. 263, 292, wherein he wrote, "I could not conclude that the violation of the privilege against self-incrimination implicit in the facts relating to the exemplar was waived in the absence of advice of Counsel."

Further in Schwartz, our Court held that the exemplar was admissible because of holdings in Gilbert and U. S. v. Wade, 388 U.S. 218, 221-223. However, in Wade the Court held no objection was made to the offer of proof and, that, too, is the holding in California v. Byers, 402 U.S. 424,433.

Further in Wade, "The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross examination of the bank employees involved no violation of Wade's privilege." Therefore, Gilbert is distinguishable because it, at Page 267, relies upon Wade, and, as hereinbefore set forth, the offer of proof in Wade went into evidence without objection, as it was part of the defendant's case. Certainly the forcing of this defendant to speak was testimonial and that testimony convicted him.

Further, the claim is made that the exemplars are testimonial and communicative matter. Why else would the request be made by the government. This is not a case of a rapist identifying a person and collaborating it by the voice - the only testimony against the defendant is his voice. The offer is testimonial.

If this Court allows the voice exemplar to be played in the trial in chief, it might just as well ask the defendant to stand up so that the jury may compare his voice as he speaks in Court with the tapes. To carry it one step further, the Court might as well allow and permit the government to order the defendant to take the stand where his voice can be heard, so it might be compared with the recordings - and his voice is testimonial as an overt act of the crime.

It is respectfully submitted no Court has gone as far

as this Court went in allowing these exemplars to be played when proper objection was made to their being played, and to their admissibility in the first place.

CONCLUSION

It is respectfully submitted the case should be reversed and the case remanded to the district court with direction to dismiss the indictment with prejudice.

Respectfully submitted,

ROGER J. FRECHETTE
215 Church Street
New Haven, Connecticut 06510

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 1977, I served the foregoing Appellant's Brief and Appellant's Appendix upon counsel for the appellee, causing copies to be mailed, postage prepaid, to:

Peter Casey, Esq.
459 Main Street
Hartford, Connecticut

Roger J. Frechette

ADDENDUM

STATUTES CITED

TITLE 18, UNITED STATES CODE

Section 1955. Prohibition of illegal gambling business

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section -

(1) "illegal gambling business" means a gambling business which -

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests,

interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activi

Section 2518(8)(d):

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of --

(1) the fact of the entry of the order or the application

(2) the date of the entry and the period of

authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

Section 2518(10)(a)(i)

(a)Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communications, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

Section 3161(e)

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final...

TITLE 47, UNITED STATES CODE

Section 605. Unauthorized publication or use of communications

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or di-

buting officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

III. Statement of time limits adopted by the Court and procedures for implementing them.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REVISED RULE 50(b) PLAN, EFFECTIVE JULY 1, 1976

Pursuant to the requirements of Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974, (18 U.S.C. Chapter 208), and the Federal Juvenile Delinquency Act 18 U.S.C., Sections 5036, 5037), the Judges of the United States District Court for the District of Connecticut have adopted the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings.

Throughout this Revised Rule 50(b) Plan (hereinafter Plan), the District of Connecticut has decided to adopt, effective July 1, 1976, the statutory time limits for July 1, 1979, mandated by the Speedy Trial Act of 1974. By accelerating the effective date of the 1979 time limits, it is hoped that problems in compliance will be identified and solved before sanctions are applicable. While we are adopting the 1979 time limits effective July 1, 1976, none of the sanctions encompassed in 18 U.S.C., Section 3162 will become effective until July 1, 1979, the deadline mandated by Congress...

III-6

...5. Time Within Which Trial Must Commence.

...(b) Measurement of Time Periods. For purposes of this Rule (and not for purposes of considering Double Jeopardy claims):...

(2) A trial in a jury case shall be deemed to commence at the beginning of voir dire.

(3) A trial in a non-jury case shall be deemed to commence on the day the case is called when the judge orders that the case have an "on trial" status...

III-8

...(e) Retrial. The retrial of a defendant shall commence

within 60 days from the date the order occasioning the retrial becomes final. If the retrial follows an appeal or collateral attack, the Court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 60 days impractical. The extended period shall not exceed 180 days. (Section 3161(e))...

III-13

...9. Exclusion of Time from Computations.

(a) Applicability. In computing any time limit under Section 3, 4, 5, or 6, the periods of delay set forth in 18 U.S.C., Section 3161(h) shall be excluded...

III-16

...(e) Post-Indictment Procedures.

1) In the event that the Court continues an arraignment or trial beyond the time limits set forth in Section 4 and 5, the Court shall determine whether the limit may be recomputed by excluding time pursuant to 18 U.S.C., Section 3161(h). In the absence of a need for a continuance, the Court will not ordinarily rule on the excludability of any period of time.

2) If it is determined that a continuance is justified, the Court shall set forth its findings in the record, either orally or in writing. If the continuance is granted under 18 U.S.C., Section 3161(h)(8), the Court shall also set forth its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial. If the continuance is to a date not certain, the Court shall require one or both parties to inform the Court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the Court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstance. The Court shall determine the frequency of such reports in the light of the facts of the particular case...

III-20

...13. Effective Date.

Upon approval of the reviewing panel designated in accordance with 18 U.S.C. Section 3165(c) and Rule 50(b) of the

Federal Rules of Criminal Procedure, the time limits and procedures set forth herein shall become effective July 1, 1976, and shall supersede those previously in effect...

III. Statement of time limits adopted by the Court and procedures for implementing them.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REVISED RULE 50(b) PLAN, EFFECTIVE OCTOBER 6, 1975, 2:37 P.M.

...7. Retrials. Where a new trial has been ordered by the District Court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order. If the defendant is to be retried following an appeal or collateral attack, the court trying the case may extend such period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from the passage of time shall make trial within 60 days impractical...